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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

WALLACE GLICK, by His Guardian and Curator, Bessie McGinty, and Bessie McGinty, Individually,
Appellants,

vs.

BALLENTINE PRODUCE INCORPORATED, Charles James Harris, C. J. Harris, and Alice J. Reed, Administratrix of the Estate of William Claire Reed, Deceased.
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

ELWYN L. CADY, JR.
531 Altman Building
103 Petticoat Lane
Kansas City, Missouri 64106
324 Bellevista Drive
Independence, Missouri 64050
Counsel for Appellants.

R. L. MIDKIFF, Inc., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

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I. Right to Life Is Protected from State Encroachment by This Court

Appellees contend that this Court's hands are tied because the right to life, and its corollary, the duty to compensate fully for life destroyed, does not merit federal protection.

Such was the position of the Court back in 1873 with the *Slaughterhouse Cases*, 16 Wall. 36, but "the rationale of the Court in the *Slaughterhouse Cases* was gradually to be abandoned. The Court was to begin to protect individual rights against state encroachment by finding that the state infringement of those rights was a deprivation of life, liberty, or property without due process of law, forbidden by the Fourteenth Amendment." WILLIAMS, THE SUPREME COURT *SPEAKS* 132-133.

Griswold v. *Connecticut*, 381 U.S. 479, certainly demonstrates that this Court in today's world properly takes jurisdiction to protect fundamental rights of individuals against the state.

II. Protection of Life Was Part of the Early Common Law in the United States and Particularly Found Recognition in Missouri

Though it is submitted that a federal question is presented regardless of this Court's views on whether or not life was protected by wrongful death awards at common law, appellees make much of the historical error which numerous courts, including this Court in 1877 in *Insurance Company* v. *Brame*, 95 U.S. 754, were led into by an "off the cuff" holding of a trial judge.

Every scholar who has turned his attention to the history of the common law death action concludes that the right to recover for wrongful death was one of the most fully established of all rights in early English law. Appleman, "Common Law Causes of Action for Wrongful Death," 1957 TRIAL AND TORT TRENDS 61, 64; Holdsworth, "The Origin of the Rule in Baker v. Bolton," 32 L. Q. Rev. 431 (1916).

Justice Frantz of the Colorado Supreme Court recently reviewed the history in his talk in Denver, May 8, 1963:

"In early English law the life of every man, including the King, was estimated as a certain price, which was called 'wer'. The amount varied according to the station and dignity of the person. . . .

"Wer is an old English word meaning 'man'. Gild is an old English word meaning 'compensation'. In Pollock and Maitland's 'History of English Law', we are told:

> * * * Full scales of composition are established. A freeman's life has a regular value set upon it, called *wergild*, literally 'man's price' or 'man-payment' or oftener in English documents *wer* simply; moreover, for injuries to the person short of death there is an elaborate tariff. . . ."

The entire uproar in modern English law came about when a trial judge, "whose forte was never common sense" [PROSSER, TORTS (3d ed. at 927)], in an *ipse dixit* in 1808—long after the United States had begun its own common law development—stated: In a civil court the death of a human being could not be complained of as an injury. *Baker* v. *Bolton*, 1 Camp. 493, 10 Rev. Rep. 743, 170 Eng. Repr. 1033 (1808). It has repeatedly been noted that the decision contained no citation of precedent and no rationale. Thus, the decision was completely unsupported by either authority or reason.

"It must be remembered that Baker v. Bolton was a *nisi prius* case, tried in the local court before a single judge rather than en banc in the superior court at Westminster. The case involved only a small amount of money and apparently was not extensively argued. Ellenborough's reported opinion is very brief, and the controversial rule of law was laid down without either sustaining reasoning or supporting authority." Smedley, "Wrongful Death: Bases of the Common Law Rules," 13 *Vand. L. Rev.* 605, 614-615;

Voss, "Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana," 6 *Tul. L. Rev.* 201, 205 ("The absurdity and injustice of such a doctrine is apparent.").

Tiffany, in his DEATH BY WRONGFUL ACT (ed. 2) 16, states that no satisfactory reason for the rule has ever been suggested. BURDICK, LAW OF TORTS 231:

> ". . . it is a matter of regret and wonder that the courts in the last century did not reject the rule as barbarous." See, also 1 JAGGARD, TORTS 327-328.

Missouri did reject the rule. *James* v. *Christy,* 18 Mo. 162 (1853). It is submitted that the force of *James* still stands. *Note,* 14 *St. L. L. Rev.* 184, 190 (as of 1929, case never overruled). Also, it should be noted that Mr. Justice Hunt, in *Brame,* was cited to *James* but he declined to discuss it as he distinguished other cases cited.

Professor Keefe's commentary in his column in the American Bar Association JOURNAL bears noting:

> "The basic difficulty in these cases is that we are still laboring under the delusion that an American personal representative whose deceased is wrongfully killed, needs Lord Campbell to permit our courts to entertain the action against the wrongdoer. Can this be any longer true?" (Vol. 48 at 877).

A follow-up opinion is quoted in the same column in the December, 1962 issue (Vol. 48 at 1182):

> "As far as I have been able to discover, a complete misunderstanding has existed in the American courts on this subject for too many years.
>
> "The common law revolved around a single precept: For every injury, a remedy. The right of a widow to recover for the wrongful killing of her husband was recognized in ancient days. 'Every man's

life had a fixed money value, called the wergild. In the case of a freeman, this compensation for murder was payable to his kindred.' (*English Constitutional History*, by Taswell-Langmead, 7th ed. 1911, page 32).

"The Magna Charta, Sec. 54 stated: . . . 'No one shall be taken or imprisoned on the appeal of a woman except for the death of her husband.' 'Appeal' used here has no relation to the modern meaning. It was the right of the widow, and those representing her, to institute a private suit, resulting in a criminal punishment which could not be pardoned by the crown. This was the principle. In practice, it represented legalized blackmail of the guilty party in a death which resulted in a money recovery for the widow; and was well supported in practice. The 'appeal' could be carried out even if the defendant had already been indicted and tried in a criminal action and acquitted. 'Appeals' were finally abolished in 1819, because the principle of recovery for wrongful death was effectively embodied in the English law.

"Another example of the right to recover for wrongful death, was that in 'escape', wherein a person suffered death in a municipality. * * * This was enacted in 1285. * * * This principle remained in English law until late in the 19th century when the counties took over the responsibility.

"C. K. Allen . . . quotes the principle which should apply as stated by Lord Mansfield: 'The reason and spirit of cases make law, not the letter of particular precedents.' And again, 'the law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases.'

"The entire law of 'Appeal' and 'Escape' appears to have been unknown to our own judges. In addition, there was no true knowledge in this country of the practice at common law. Poor abstracting of judg-

ments and economic unwillingness of the young states to accept the burdens recognized by English municipalities, both combined to repress the principle that 'for every injury, there is a remedy.'

"The exhaustive analysis of present day scholars of alleged common law precedents is a necessity. It is vital to establish a correct map of the law's topography.

"As you point out, the issue is real, and the need for a reappreciation of the common law is vital."

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103 Petticoat Lane
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324 Bellevista Drive
Independence, Missouri 64050
Counsel for Appellants.

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